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# THE SCHOLARSHIP OF KENNETH PYE

Francis A. Allen\*

In considering the career of Kenneth Pye, we are in danger of thinking of him solely as a distinguished administrator of rare executive qualities. He was, after all, a university president, a university chancellor, law school dean, president of the Association of American Law Schools, and the guiding spirit of a leading legal-aid association. But Kenneth Pye was also a teacher and a scholar, and his commitments in these latter capacities were central to his life and thought. It is impossible fully to grasp the aspirations that moved him as an educational administrator without giving close attention to his career in the classroom and to his written work.<sup>1</sup> Despite what might seem the overwhelming demands of his administrative obligations, he produced a substantial corpus of writing.<sup>2</sup> There are two principal reasons for considering his written productions at this time. First, the writings throw light on his character and intellectual commitments. There is a morality of scholarship, and often much can be learned of the fiber and capacities of the individual by testing how he or she responds to the ethical demands of the intellectual life.<sup>3</sup> Second, much in the corpus of Pye's written work, produced over almost four decades of the recent past, remains relevant to present needs and concerns. Perhaps because so much legal literature is produced in the United States today, there is a tendency for the work of the past, even that of highest quality, to sink into speedy oblivion. The wisdom and insights of Kenneth Pye's scholarship, if attended to, could make important contributions to the present. We cannot afford to neglect them.

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1. It is my clear impression that Pye often regretted the diversion of his efforts from scholarship and teaching necessitated by performance of his administrative obligations, and that he looked forward to a period when he could devote much more time to the former.

2. Speaking of another law school dean, Pye once wrote: "Only a few [academic administrators] have found it possible to combine administrative expertise with genuine scholarship in the classroom and in print." A. Kenneth Pye, *Frank T. Read*, 15 *TULSA L.J.* 7 (1979). Certainly he himself was included among the few.

3. This is often, but not always, true. The scholar who honors all the strictures of scholarly production in his written work, but who neglects the same principles of candor and fairness in his personal relations, is a phenomenon not unknown on university campuses. Kierkegaard somewhere (I have lost the reference) refers to philosophers who in their books construct magnificent mansions of ethical theory, but who in their private lives are content to live in tawdry hovels next door. No one whose character was as strong and integrated as Kenneth Pye's could be described in this way.

What follows in this brief essay must be regarded only as a sampling of his scholarship, not a systematic survey.

Kenneth Pye's first contribution to the law journals as a faculty member appeared in 1956 when he was just twenty-five years of age. As with many of us, his maiden effort was a book review, in this instance a review of a volume on military justice, reflecting his just-concluded experience as a military lawyer in the Korean war.<sup>4</sup> A steady stream of essays, articles, and reviews followed until its untimely conclusion early in this decade. Any generalizations concerning a body of work of such size, produced over so long a period, must in many respects be fallible. Yet a few general observations may be risked.

Pye was a member of the group of legal scholars who began their work under the influence of the liberalism that flourished in the years immediately following the Second World War. It was a liberalism that placed great weight on the rights of individuals confronting the weight of state authority in the criminal process. It contained a strong egalitarian strain. It was idealistic in that it fostered the conviction that the problems of poverty and the wounds of racism can be overcome by intelligent and dedicated action, action both of individuals and of agencies of government. As Learned Hand once observed, liberalism is less a creed than a frame of mind.<sup>5</sup> It is a mind-set that has faded in recent years. Even law teachers today are sometimes heard asserting with a fine scorn that the "liberal model" can no longer serve as a "template" for American society. All of Kenneth Pye's work, in varying degrees of intensity, reflects the liberal frame of mind. His liberalism, however, was strongly colored by his personal values. Both temperament and experience produced in him an intensely pragmatic approach to social and legal issues. He was not a visionary. He understood from the start that the ultimate test of social theory is social reality, hence knowledge of social reality became for him a prime requisite. Much of his realism stemmed from direct participation in the processes of criminal justice, but much also was acquired through conscientious study. The command of facts was one of his leading characteristics, both as a scholar and an administrator.<sup>6</sup>

There were other dimensions to Kenneth Pye's liberalism. Although strongly supportive of the rights and immunities of persons caught up in

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4. A. Kenneth Pye, *Military Justice in the Armed Forces of the United States*, 9 J. LEGAL EDUC. 135 (1956) (book review).

5. Letter from Judge Hand to the Honorable Charles Fremont Amidon (Feb. 24, 1928), quoted in part in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 443 (1994).

6. One good example of the comprehensive marshalling of data that characterized Pye's work is his article, *Legal Education Past and Future: A Summer Carol*, 32 J. LEGAL EDUC. 367 (1982). The article shows familiarity with population trends, Department of Labor projections of legal employment, consultants' memoranda on tuition and financial-aid trends, studies of the "opportunity gap" in employment placement between graduates of the "most renowned" law schools and graduates of other schools, studies of a growing discrepancy between salaries paid top law school graduates and those paid members of law faculties, the effects of inflation on faculty salaries, and statistics on the exponential increase in library expenditure. *Id.* at 368-74.

the criminal justice system, he was sensitive to the critical need for preservation of basic social institutions against anarchistic assaults on the peace and good order of the community. Moreover, his espousal of individual freedom against unwarranted exertions of public authority was flanked by a strong sense of personal and professional responsibility. Liberty for him was not a license to withdraw from the clamor of his times, but an opportunity to confront and ameliorate the ills of his society.

A word needs to be said about the style of Pye's scholarship—his literary style and mode of argument. It is interesting to observe how early in his career the young professor found his own distinctive voice. The prose is simple and direct, often emphatic and sometimes abrupt. The argument is typically "fact-based." Repeatedly, he punctures arguments and generalizations by revealing what we do not know. He called for more empirical inquiry in the administration of criminal justice, and decried the fact that reporters of the American Law Institute's Model Code of Pre-Arrest Procedure failed to undertake such studies preliminary to the drafting of the Code.<sup>7</sup> He added the caveat, however, "that we should be careful that such projects are not designed with the object of collecting information either to sustain or refute police objections. They must be aimed solely at determining the truth, not 'assembling the data' for a brief in which the conclusion has already been reached."<sup>8</sup>

At times the writing takes on an epigrammatic quality. Commenting on the pre-trial detention of criminal suspects, he wrote: "We seem to be quite willing to lock up defendants before trial when they are presumed to be innocent, and to release them when they have been found guilty."<sup>9</sup> Many years later he ruefully observed:

I have, on occasion, facetiously commented that the difference between a CEO of an educational institution and a CEO in the business sector is that in the business sector, a direct order and pointed suggestions are taken seriously, while at a university, a direct order is viewed as an agenda for debate, and pointed suggestions may be regarded as the desultory ramblings of a madman.<sup>10</sup>

Speaking of the right to counsel, he said: "The game is quite different when each side has a goalie."<sup>11</sup>

Kenneth Pye's scholarship was dedicated to logic and fact, but it also rested on the bedrock of his basic moral convictions and sense of decency. His scorn for the hypocrisy and insensitivity to human values encountered in the functioning of social institutions often broke through the

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7. A. Kenneth Pye, *The Supreme Court and the Police: Fact and Fiction*, 57 J. CRIM. L., CRIMINOLOGY & POL. SCI. 404, 406 (1966).

8. *Id.*

9. A. Kenneth Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 690 (1964).

10. A. Kenneth Pye, *What's Wrong with Our Universities—An Additional View*, 14 HARV. J. L. & PUB. POL'Y 335, 351 (1991).

11. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 (1968).

surface of his writing.<sup>12</sup> He protested the provisions of the A.L.I.'s Code of Pre-Arraignment Procedure that would deny impoverished suspects the right to counsel in the early stages of the criminal process,<sup>13</sup> and was outraged, with other commentators,<sup>14</sup> by the statement of Attorney General Katzenbach that the "suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, . . . [is] particularly irrelevant."<sup>15</sup> Pye's reaction to the Code provisions lays bare some of his deepest convictions:

The resolution of these problems in a sense poses the basic question of the kind of society in which we wish to live. The various proposals to discard the *Mallory* rule are grounded upon the basic proposition that we can and should rely on the weakness and ignorance of the citizen to confess when he is isolated from his family and friends and subjected to police interrogation in an alien environment. This is necessary because the police need confessions in order to solve more cases and obtain more convictions. Society is asked to deemphasize, if not ignore, the fact that the major weaknesses in our system of criminal justice stem from society's inability to cope with crime causation, the inadequacy of the criminal law alone to deal with the underlying social problems that manifest themselves in violations of law, society's inability to try all the guilty defendants now brought before the courts because of the shortage of judges, prosecutors, and physical facilities, and the tragic weakness of correctional programs.

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12. See, e.g., A. Kenneth Pye, *Criminal Justice 1968: Developments and Directions*, 17 CATH. U. L. REV. 428, 448-49 (1968).

Rights given to individuals are now being implemented and enforced. Experience may indicate that the requirements of law enforcement are inconsistent with some of these rights. If this proves to be the case, society may determine to limit the rights of its citizens. Such an approach is far sounder than paying lip service to sham rights which do not exist in practice.

*Id.* (citations omitted).

13. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 4.04, 4.05, 5.08 (Tentative Draft No. 1, 1966). Pye's opposition is stated in at least two of his articles: *The Supreme Court and the Police: Fact and Fiction*, *supra* note 7, at 415; *Charles Fahy and the Criminal Law*, 54 GEO. L.J. 1055, 1065 (1966).

14. See, e.g., Yale Kamisar, *Has the Court Left the Attorney General Behind?* 54 KY. L.J. 464, 472 (1966):

The issue is not whether the government should ignore crime caused by poverty and ignorance, but whether with respect to the assertion of the privilege of self-incrimination or the right to counsel or the protection against unreasonable search and seizure, the government should exploit the influences of poverty or ignorance—or seek to minimize them.

*Id.* at 496-98 (quoting Letter of Anthony G. Amsterdam to the Hon. David L. Bazelon, United States Courts of Appeals (July 2, 1965)).

15. Attorney General Nicholas Katzenbach, in a letter addressed to Judge David L. Bazelon, dated June 24, 1965, stated in part:

Your suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, strikes me as particularly irrelevant. The simple fact is that poverty is often a breeding ground for criminal conduct and that inevitably any code of procedure is likely to affect more poor people than rich people. . . . A system designed to subject criminal offenders to sanctions is not aimed against Negroes, Mexicans, or Puerto Ricans . . . simply because it may affect them more than other members of the community.

Quoted in Kamisar, *supra* note 14, at 492.

Instead, we should focus our concern upon catching more of the guilty and procuring their guilt from their own lips.<sup>16</sup>

No attentive reader of Pye's writing can for long be unaware of the depth of feeling it communicates. Yet his devotion to fact and reason protected him from capture by mere feeling. His dedication to rationality and the lessons learned as a criminal justice participant brought him at many points in his scholarly career to positions not often associated with the liberal stereotype.

One final general observation is required. A reader approaching Kenneth Pye's writing for the first time will almost certainly be impressed by the breadth of his work, by the range of topics addressed, and by the scope of the analysis devoted to individual topics. Very early in his career, for example, he recognized the importance of placing many of the issues he considered in an international context. While still in his twenties he was co-author of an article that attempted to fashion an approach to comparison of American and foreign systems of criminal justice.<sup>17</sup> Studying the language of foreign statutes is not enough, he argued, for in all systems of justice there are wide chasms between "law in the books" and "law in action." "Such factors as the traditions of the bar and the integrity of the police may be more important than a grandiose statement of the rights of an accused in the constitution. Unfortunately, an appreciation of these factors requires intensive personal observation of the bench, bar, and actual court proceedings."<sup>18</sup>

There is another level of difficulty encountered in the search for understanding of our own or foreign institutional systems, a proposition I believe to be implicit in the article's argument. Observations of systems in operation are crucial, but simple observation only partially answers why institutional habits have developed as they have and, when these habits result in unhappy consequences, why deficiencies of decency and efficiency are hard to repair. Kenneth Pye's scholarship is anything but parochial. It presents a fair cross-section of the theoretical and operational issues confronted in much of the legal thought of his time.

## I. CRIMINAL PROCEDURE AND THE CONSTITUTION

The paragraphs that follow present a necessarily truncated view of several areas of particular concern to Kenneth Pye and to which he made important contributions. In 1968 he published a widely read and much

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16. Pye, *Charles Fahy and the Criminal Law*, *supra* note 13, at 1065.

17. Joseph M. Snee & A. Kenneth Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO ST. L.J. 467 (1960).

18. *Id.* at 473. Pye's other articles containing an international or comparative focus include an essay properly critical of Canadian constitutional provisions dealing with the rights of criminally charged persons. *The Rights of Persons Accused of Crime Under the Canadian Constitution*, 45 LAW & CONTEMP. PROBS. 221, 246 (1982) ("in areas where the danger of governmental abuse is great, the constitution provides few protections"); *see also The Effect of Foreign Criminal Judgments in the United States*, 32 UMKC L. REV. 114 (1964); *The Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956).

admired article in the *Michigan Law Review*, entitled *The Warren Court and Criminal Procedure*.<sup>19</sup> In it he displayed again one of the distinguishing characteristics of his work: an impatience with the discrepancies between articulated ideals and actual institutional performance. He deplored "the disparity between the reality of the criminal process and the ideal of civilized conduct to which we as a nation had sworn allegiance" that typified federal and especially state criminal procedures in the pre-Warren Court era.<sup>20</sup> He lauds the Warren Court for narrowing the gap between promise and performance:

The gulf between the illusion and reality of constitutional protection has been narrowed. The quality of justice meted out to the poor more closely approximates that available to the rich. In many areas we are beginning to implement rights to which we have paid lip-service for decades. We have begun to remove much of the hypocrisy which characterized our criminal process.<sup>21</sup>

Pye saw the Warren Court's activism in criminal cases as an almost inevitable result of its confrontation with the problems of race and inequality in American society. Criminal cases could not be excluded from that confrontation because the treatment of minority citizens in state systems of criminal justice produced some of the most virulent manifestations of inequality. He applauded the Court for accurately perceiving the true nature of the issues coming before it in the criminal cases:

It is to the credit of the Court that it recognized that the nation was in the midst of a social revolution before this became apparent to most of the elected representatives of the people, and it sought to eliminate the basic defects in our system for the administration of criminal justice within our present structure.<sup>22</sup>

One can only speculate how Kenneth Pye would have responded to the current fashionable espousals of "localism" and the hostility directed to all exertions of federal authority (except, perhaps, those advancing the particular interests of the speaker). It is clear that Pye believed many important decisions within the justice system can best be made locally; he was an early exponent, for example, of "block grants" to states and localities in the administration of federally-funded programs of legal aid for the poor.<sup>23</sup> It was also clear to him that exercises of federal judicial power in the criminal process are not only appropriate, but essential to basic freedoms:

It is not surprising that the majority of the Court has accepted the argument that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants in criminal cases any more than it permits experimentation with

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19. 67 MICH. L. REV. 249 (1968).

20. *Id.* at 253.

21. *Id.* at 254.

22. *Id.* at 256.

23. A. Kenneth Pye & George C. Cochran, *Legal Aid—A Proposal*, 47 N.C. L. REV. 528, 582 (1969).

first amendment freedoms.<sup>24</sup>

In 1968, Kenneth Pye was convinced of the permanence of the Warren Court's contributions toward a more healthy American society and optimistic that they would be followed by further amelioration of the inequalities separating rich and poor, black and white, in American life.<sup>25</sup> As he wrote, however, Congress was attempting to repeal legislatively some of the judicial advances of the Warren years, a fact explicitly adverted to in the article.<sup>26</sup> Indeed, the late 1960s may be seen as marking the end of an era in which criminal policy in the United States was based significantly on the principles of liberal politics, in which efforts were made to achieve not only crime repression, but also in some measure social reconciliation.<sup>27</sup> The almost three decades that followed are the era of the "war on crime" in which the objectives are seen to be almost exclusively those of repression and incapacitation. The new mood has patently affected the adjudication of the Supreme Court. Its restatement of the law of the Fourth Amendment sufficiently demonstrates the point.<sup>28</sup>

Whether or not events subsequent to his 1968 article suggest that Pye was unduly sanguine about the progress made in the Warren years, it should be noted that his optimism never overcame his critical faculties. His attitudes toward *Miranda v. Arizona*,<sup>29</sup> perhaps the most important of the Warren Court's criminal cases, are revealing. He welcomed the decision and admired the support given the majority of the Court by other commentators, in particular Yale Kamisar.<sup>30</sup> But the measured tone of his own analysis was distinctive:

The fact of the matter is we do not know what, if any, effect the decisions will have in law enforcement. There have been loud protestations of impending doom from some police officials. . . . Limitations on interrogation may affect the proof of guilt in *causes célèbres* such as those involving a solitary killing or a rapist. These cases are important but they constitute a minute percentage of crimes committed. They are not so numerous that they have a major impact on the administration of criminal justice.<sup>31</sup>

Writing before the advent of such developments as DNA evidence, he noted that other methods of solving "high profile" cases may result from "greater technological assistance to police forces."<sup>32</sup> On the whole he

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24. Pye, *The Warren Court and Criminal Procedure*, *supra* note 11, at 258.

25. "It seems doubtful that any substantial long-term retreats will be taken from the positions already assumed by the Court." *Id.* at 267.

26. *Id.* at 265.

27. FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 27-28 (1996).

28. John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105 (1989).

29. 384 U.S. 436 (1966).

30. Professor Kamisar's articles are collected in his book, *POLICE INTERROGATION AND CONFESSIONS* (1980).

31. A. Kenneth Pye, *Interrogation of Criminal Defendants: Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 119, 208 (1966).

32. *Id.*



welcomed the *Miranda* decision, not only for the values asserted by the majority of the Court, but also as an opportunity to gain a more penetrating empirical understanding of the criminal justice system. After all, the procedures mandated by the Court "must be placed in practice before their effects can be known."<sup>33</sup> He was willing to accept the verdict of actual experience: "If the fears of the dissenters prove justified, it may be necessary to reconsider whether society can afford the luxury of the values protected and implemented in the decisions."<sup>34</sup> Yet for the present he strongly approved the *Miranda* decision and expressed his assent by recalling a quotation of Benjamin Disraeli: "Any other result would have permitted precedent [to] embalm a principle."<sup>35</sup>

For all his interest in the performance of the Warren Court, it seems accurate to say that Kenneth Pye was not primarily concerned with the emerging and sometimes evanescent intricacies of constitutional doctrine. His greater attention remained engaged by the actual operations of the criminal justice system, many aspects of which implicated values of highest importance but some of which were not and perhaps could not be adequately confronted as problems of constitutional doctrine. His earliest writing urges the reform of various aspects of American criminal procedure. "For years," he wrote, "we have stood like Kafka's advocates adapting ourselves to existing conditions and resisting any temptation to seek change, no matter how much present practices go against the grain."<sup>36</sup> While in his early thirties, he published a brief but eloquent case for expanding discovery rights of defendants in criminal cases:

[A] day will come when we will look back with incredulity on a criminal trial, the hallmark of which was the surprise witness who could not be successfully impeached because of the absence of discovery. . . . The destruction of the fox hunt concept of a criminal proceeding requires that both sides be given opportunity to prepare for the issue which will be litigated at trial.<sup>37</sup>

And again: "My thesis is simple. More liberal discovery is necessary to insure that each defendant receives a fair trial."<sup>38</sup> Since these early publications, strides have been made in many American jurisdictions toward recognition of broader discovery rights for criminal defendants.<sup>39</sup> It seems likely that Pye's polemics contributed to this salutary trend.

In 1978, Kenneth Pye published an article which again demonstrated how persistently his thought resists facile stereotyping. It is an essay of particular interest to a society emerging from the trauma of the O.J.

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33. *Id.* at 210.

34. *Id.* at 219.

35. *Id.* at 220.

36. A. Kenneth Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 685 (1964).

37. *Id.* at 689-90.

38. A. Kenneth Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 47, 82 (1963).

39. See 2 WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 474-75 (1984).

Simpson trial, for in it he ruminates on the adversary system—its legitimate functions, what can and cannot be justified in its name. The article bears the intriguing title, *The Role of Counsel in the Suppression of Truth*.<sup>40</sup>

The argument begins with the observation that there are times when defense counsel would be remiss in failing to take action that has the effect of suppressing truth.<sup>41</sup> The problem is one of establishing criteria that adequately determine when action having this result should be allowed. Clearly, he wrote:

[A] lawyer's conduct [cannot] be justified by the observation . . . that "ours is the accusatorial as opposed to the inquisitorial system," and that the adversary system will be weakened unless counsel is permitted to undertake whatever action will improve the chance of his client to prevail in the case.<sup>42</sup>

And again:

When a practice is defended solely on the ground that it is necessary to support the adversary system, it is fair to ask not only whether it will further the adversary system, but what its impact on the objectives of our adjudication process will be . . . . Indeed, it is arguable that no practice should be defensible solely on the ground that it supports the adversary system.<sup>43</sup>

Near the end of the essay this striking passage appears:

[I]t is frankly impossible to explain to the public why a lawyer should be permitted to present with impunity evidence he knows to be false. It makes little difference whether the evidence is live testimony or a document. The public expects that the conduct of lawyers in a courtroom will be at least equal to the behavior expected of laymen in the ordinary affairs of life. To examine a witness who is telling a story under oath that the witness and the lawyer know to be false does not meet the minimum standard of conduct.<sup>44</sup>

Pye's approach was to determine, first, what purposes are sought to be achieved through criminal adjudication and then to inquire whether a given practice or procedure advances or frustrates those purposes.<sup>45</sup> If the procedure obstructs the purposes of adjudication by suppressing truth, one then asks whether the procedure is nevertheless to be retained because it advances other values of fundamental importance. Thus the exclusionary rule in search and seizure cases by its nature suppresses truth, but many have concluded that the protection of basic Fourth Amendment rights that it may promote justifies its retention. To elimi-

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40. A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921.

41. *Id.* at 925-26.

42. *Id.* at 926 (quoting *Watts v. Indiana*, 338 U.S. 49, 54 (1949)).

43. *Id.* at 937.

44. *Id.* at 950.

45. Pye described the purposes of criminal adjudication to be (1) ascertainment of the truth of the charges, (2) determination of appropriate sanctions if defendant is found guilty, and (3) assurance that the processes are performed in accordance with law, i.e., that the law and facts are properly applied. *Id.* at 934.

nate practices resulting in the unjustifiable suppression of truth, Pye believed the more appropriate approach "is primarily through re-examination and alteration of evidentiary and procedural law, not through ethical proscriptions that would preclude counsel from asserting rights that are available to his client under law."<sup>46</sup>

The elimination or modification of the adversary system in the criminal process has become a popular topic of discussion since the Simpson trial. Unfortunately, much of the discussion is uninformed and unfocused. Were Kenneth Pye still with us, his trenchant prose could be relied on to raise the levels of reason and understanding now prevailing in current debates. Some version of the adversary process seems clearly mandated by the bill of rights of the United States Constitution. Indeed, it is the principal device our system affords to challenge and contain abusive and unlawful exertions of power by public officials operating within the criminal justice system. The improper exploitation of the adversary process by defense attorneys in contested criminal cases calls for thoughtful remedies. There is danger, however, that in concentrating on these important issues we lose sight of the fact that in the great majority of cases the adversary process does not operate at all or, at best, only peripherally and ineffectively. Most criminal defendants are impoverished. Over ninety percent of felony cases are decided on pleas of guilty.<sup>47</sup> In the cases in which impoverished defendants contest their guilt, the inadequacies of legal aid often limit the effectiveness of their defenses.<sup>48</sup> The result is that in the great bulk of criminal proceedings public officials are confronted by no effective adversarial challenge to their action. Being largely immune from consistent challenge and scrutiny, the performance of many such officials—police, prosecutors, medical examiners, and even judges—becomes flabby, inefficient, and sometimes in violation of the law. So entrenched do these dysfunctional habits become that members of the law-enforcement bureaucracy are sometimes unable to rally to higher levels of performance even when confronted by high-profile cases in which severe and well-financed challenges to their initiatives are inevitable. Ironically, many who are today urging a drastically truncated adversary process are among those who would most strenuously oppose substitute measures to scrutinize and contain official exertions of authority in the criminal process, such as systems of external administrative oversight that prevail in almost all industrial societies except our own.<sup>49</sup> Kenneth Pye understood as well as anyone the urgent necessity of rein-

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46. *Id.* at 925.

47. About 752,000 persons, representing 91% of those sentenced for a felony in 1990 pleaded guilty. The rest were found guilty by a jury or by a judge in a bench trial. PATRICK A. LANGAN & RICHARD SOLARI, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 1990, at 38 (1993).

48. See John B. Arango, *Tennessee Indigent Defense System in Crisis*, CRIM. JUST., Spring 1992, at 42.

49. ALLEN, *supra* note 27, at 57-58.

vigorating the adversary process on behalf of the impoverished accused, and to his contributions in the area of legal aid we now turn.

## II. LEGAL REPRESENTATION OF THE POOR

Kenneth Pye's articles on legal aid expose the basic values on which all of his work rested. Proper provision of legal assistance to the poor raised for him issues of personal morality, professional responsibility, and enlightened social policy. The depth of his feeling about the problems of weak, helpless, and uneducated persons confronting a penal system insensitive to their needs and often brutal in its responses, is not wholly hidden by the discipline of his thought. In a 1966 article, he appended this quite atypical peroration:

Our alternatives are many, once the strategy is determined. The time is now. The profession and the nation cannot afford to miss the opportunity. If we do not determine our strategy soon we can reasonably anticipate a war of attrition in which a decisive victory is impossible. The legal front of the war against poverty must not be permitted to grind to a halt in the mud of Passchendaele.<sup>50</sup>

The young Kenneth Pye was a committed participant in the national "War Against Poverty" undertaken by the administration of President Lyndon Johnson.<sup>51</sup> It is easy to dismiss the enthusiasm of those years as naive and visionary; in fact, excesses were committed in the name of reform, and the relations of means and ends were often misconceived. Yet the history of the "War On Poverty" would have much to teach if we were receptive to its lessons. It is sobering, too, to inquire whether the excesses committed in the current "wars" against crime and drugs are not at least as extreme as those of the "War On Poverty," and perhaps more destructive to important social values. Pye, of course, was neither a visionary nor a sentimentalist. His approach to the issues of legal aid was imbued by the same respect for fact and reason that characterized his other work.<sup>52</sup> The result is a series of essays that retains considerable

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50. A. Kenneth Pye, *The Role of Legal Services in the Antipoverty Program*, 31 *LAW & CONTEMP. PROBS.* 211, 249 (1966).

51. An early article speaks of the "War Against Poverty" as a "social necessity." It continues: "We think that [participation] is required by the nature of the lawyer's professional responsibility and will ultimately inure to the profession's [benefit]." A. Kenneth Pye & Raymond F. Garraty Jr., *The Involvement of the Bar in the War Against Poverty*, 41 *NOTRE DAME LAW.* 860, 861 (1966).

52. Pye's approach to poverty law often evidenced a strong awareness of economic realities and the dilemmas they create. His skepticism of the then-current attacks on slum landlordism provides one example:

Is it likely that landlords will repair their premises, maintain them and still not raise the rent? Or is it more likely that landlords when forced to maintain low-cost housing in harmony with housing codes would divert the property to another, more profitable use? . . . What is needed are legislative proposals that will redirect economic resources to maintain rather than destroy the housing that poor families require.

Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23, at 578-79.

historical and contemporary importance.<sup>53</sup>

As is true in all of his writing, Pye approached the topic of legal aid from a broad social perspective while displaying an impressive command of the technical aspects of the subject.<sup>54</sup> Providing an effective and comprehensive system of legal representation of impoverished persons was for him an integral ingredient of any realistic program of social reform, and could be expected to advance the interests of all segments of society. His conception of what is encompassed in an adequate system of legal aid was unusually broad. He was sensitive to "the fallacy of attempting to isolate the needs of the poor in the administration of criminal justice from the overall impact of poverty upon the law,"<sup>55</sup> as shown by this passage: "A system which is content to provide counsel in a criminal trial and to ignore the problems of pretrial release, the social problems resulting from the defendant's poverty and his incarceration, and the prospects for his rehabilitation, is very much like a doctor giving morphine to a patient . . . with gangrene."<sup>56</sup>

And again:

The acquitted defendant is still poor and has substantial problems to face . . . . The convicted defendant needs a continuing relationship with counsel while he is in prison in order effectively to seek a reduction of sentence, to have representation before the parole board, or perhaps to prepare a collateral attack on his conviction. His family needs legal assistance in civil matters while he is in prison.<sup>57</sup>

When considering the legal needs of the poor, distinctions between "civil" and "criminal" legal aid are unrealistic and artificial. According to Pye, "[t]he merger of civil and criminal legal aid is required if we are to provide legal services that will really meet the needs of the indigent in a systematic and efficient manner."<sup>58</sup>

Pye considered the fostering of effective systems of legal aid to be a prime responsibility of the legal profession. It was a responsibility that had not been adequately performed in the past. In 1969, he referred to "an adverse reaction on the part of the public to a profession that has been permitted to exercise monopoly power for private gain but then fails to develop techniques to make its services available to all."<sup>59</sup>

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53. Pye's published articles on legal-aid issues include the following: Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23; Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, *supra* note 51; A. Kenneth Pye, *The Legal Needs of the Poor: The Administration of Criminal Justice*, 66 COLUM. L. REV. 286 (1966); Pye, *The Role of Legal Services in the Antipoverty Program*, *supra* note 50.

54. Pye was also interested in efforts of the past to provide legal representation for the poor. A particularly valuable historical account of the early organizational problems faced by the Neighborhood Legal Services Project and the erosion of its plans for law reform may be found in Pye, *The Role of Legal Services in the Antipoverty Program*, *supra* note 50, at 231-43.

55. Pye, *The Administration of Criminal Justice*, *supra* note 53, at 299.

56. *Id.*

57. Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23, at 573.

58. *Id.*

59. *Id.* at 528.

It was much to the legal profession's interest and to that of the country for the bar to become actively involved in the then-current efforts to achieve social reform:

Lawyers have a special interest in the determination of whether [legal institutions] should be preserved, modified or destroyed. They have power out of keeping with their numbers. The social reformer and the politician must appreciate the value of the support of the bar and the disadvantages which may result from its opposition.<sup>60</sup>

Pye, however, did not content himself with moral exhortations. He considered an array of factors that might inhibit the bar's support and participation in the legal-aid movement, and subjected them to hard-headed analysis. These factors include such problems as the definition of standards of indigency, the language of the canon of legal ethics, and the economics of the profession, including tensions between legal-aid programs and lawyers practicing on the fringes of the profession.<sup>61</sup>

The legal-aid movement of the 1960s was imbued with a strong reformist fervor, and there is no doubt that Kenneth Pye shared the enthusiasm. Although he wrote that "the basic objective of a national system [of legal aid] must be to provide lawyers for people who need legal assistance in the routine problems that they meet in society,"<sup>62</sup> reform objectives loomed largely in his thought. Embracing fundamental reform as integral to programs of legal aid gives rise to the problem of the "test case," a problem that has bedeviled the history of the legal-aid movement to the present. What proportion of effort, if any, should such agencies invest in litigation the dominant purpose of which is less the vindication of the rights of the client in the particular case than to effect significant changes in the functioning of governmental and social institutions? Although Pye's championing of test cases initiated by legal-aid agencies may have diminished over time, he never denied their appropriateness in some situations.<sup>63</sup> He took particular pride in the achievements of test litigation in modifying administrative practice of state welfare programs. In 1969, he and his co-author calmly, but with moral indignation clearly evident, reviewed the harsh procedures employed by some state agencies in administering welfare aid to both children and adults. These included orders terminating grants unsupported by even vestiges of due process, early-morning raids on the homes of welfare recipients to ferret out violations of welfare regulations, "maximum grant" limitations, and the like.<sup>64</sup> The authors applauded the efforts of legal-aid agencies to overturn or modify many of the practices.<sup>65</sup> This history may have considerable mod-

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60. Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, *supra* note 51, at 861.

61. Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23, at 533-35.

62. *Id.* at 568.

63. "We conclude that the dogmatic insistence that all legal services programs adopt a test case approach is not desirable. Nevertheless, *some* test cases are clearly desirable." *Id.* at 579.

64. *Id.* at 560-67.

65. *Id.*

ern relevance; the record of the states in administering federally-funded welfare systems thirty years ago may engender understandable unease about current proposals for the creation of welfare systems at the state level subjected to much less national supervision than in the past.

For all his support of the test case, Pye understood the limitations of reform-through-litigation better than most of his contemporaries. There was, first, the problem of the backlash, the problem of legal-aid agencies losing the good will of the political bodies upon which they depended for funding and other forms of support. The problem is real and continuing, and at present threatens the survival of national programs of legal aid, as today's newspaper headlines abundantly demonstrate.<sup>66</sup> Pye accurately anticipated the difficulties when he wrote that "[o]ne cannot successfully require local policy-making, and also expect priority to be given to the kind of basic changes thought desirable . . . but which the local political system is not yet prepared to make."<sup>67</sup> He reiterated that "[i]t should be recognized that the consensus which forms the basis for bar support may be jeopardized if the OEO requires local communities to allocate resources to activities aimed at institutional reform."<sup>68</sup>

Another equally cogent reason for more selective uses of test-case litigation is its limited utility as a device to effect reform. Pye did not doubt that "[t]he results of [test-case] litigation have clearly worked to the benefit of millions of Americans."<sup>69</sup> But "[t]o accomplish more fundamental changes in these areas, a legal services program must not only litigate; it must be able to develop a legislative program."<sup>70</sup> For example, "[t]here is strong reason for suggesting that legal services programs, when armed with available material, their own independent studies, and the handwriting on the wall of recent decisions, could deal more effectively with the issue of court costs in the state legislatures than in case-by-case adjudications."<sup>71</sup>

Pye's advocacy of legislation as a primary instrumentality of reform, while not wholly unique to him, distinguishes his position from that of many of his colleagues in the legal-aid movement of the 1960s. Most of those active in the movement at that time, nurtured by the Warren Court, displayed a confidence in reforms secured in courts unsupported by a democratic consensus. The immediate results of such court-imposed innovations were often desirable, and the long-term effects of some of them have been salutary; but the permanence of reform is threatened by the failure of reformers to undertake the hard task of winning the support of public opinion for such changes. The present political era demonstrates, in part, the consequences of such failure.

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66. See Peter T. Kilborn, *For Legal Aid, Tough Times Get Tougher*, N.Y. TIMES, Oct. 7, 1995, at 6.

67. Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23, at 575.

68. Pye, *The Role of Legal Services in the Antipoverty Program*, *supra* note 50, at 244.

69. Pye & Cochran, *Legal Aid—A Proposal*, *supra* note 23, at 576.

70. *Id.* at 577.

71. *Id.*

As would be expected, Pye's contributions to legal aid literature are not confined to discussions of social theory and broad issues of public policy. He also gave close attention to such immediately practical issues as the organization of legal services agencies. His views on institutional forms were strikingly eclectic. He recognized that varying conditions prevailing in different communities may require differing responses.<sup>72</sup> He was convinced, however, that the overwhelming weight of numbers may make establishment of public defender offices inevitable in urban settings.<sup>73</sup> His own extensive experience as an administrator of legal services to impoverished residents of the District of Columbia convinced him of the utility of a mixed system of legal aid employing the services of both a public legal-aid agency and private attorneys:

The operation of the [District of Columbia] Legal Aid Agency has shown, however, that a mixed public-private defender system can operate without any of the defects alleged to exist in public defender systems. The burden on the bar has been reduced substantially. At the same time the bar has not lost contact with the criminal process—it continues to display interest in the system and to contribute imagination and expertise to the defense of the poor. This combination of public appropriations and responsibility vested in the bar has proved to be an efficacious method for assuring effective representation of defendants.<sup>74</sup>

Despite the many dedicated persons who have devoted strenuous and sometimes heroic efforts to the legal representation of the poor in the years since Kenneth Pye wrote, it is clear that his high hopes for achieving something like equality for poor persons in the criminal process have not been realized. Many reasons, some of them ideological, could be advanced for this failure. Among the most important of these is the astonishing growth in the number of criminal cases in the last thirty years, caused in important part by such policies as the "war on drugs."<sup>75</sup> A need for legal services of such magnitude has been created that many localities are unable or unwilling to provide them.<sup>76</sup> Failures to respond adequately to these obligations, even in capital cases, have not in the present climate of opinion sufficiently engaged the attention and conscience of the public, the courts, and the legal profession. If someday we are able again to give serious thought to the issues Kenneth Pye addressed thirty years ago, his essays will be available to supply wisdom and guidance.

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72. Pye, *The Legal Needs of the Poor*, *supra* note 53, at 289.

73. *Id.* at 290.

74. *Id.* at 291-92.

75. The number of accused persons sentenced to prison in the federal courts alone grew from about 17,500 in 1982 to 33,600 in 1992. BUREAU OF JUSTICE STAT., U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993 494-95 tbl. 5.22 (1994).

76. See, e.g., Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); Esther F. Lardent & Douglas M. Cohen, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A. L. REV. 213 (1989).



## III. THE LAW OF CIVIL DISORDERS

In 1975, Kenneth Pye published his most ambitious scholarly effort. It is a book-length, two-part article, written with co-author Cym H. Lowell, and entitled *The Criminal Process During Civil Disorders*.<sup>77</sup> The issues addressed are of extraordinary difficulty and intricacy; a fully adequate summary would require far more delineation than can be supplied here. The context of the study was, of course, the urban riots that erupted across the country in the late 1960s and early 1970s, prompted by opposition to the Vietnam war and racial unrest. The subjects discussed by the authors, however, are of great current relevance. Urban riots still threaten our social bonds, and the dangers posed by strongly armed terrorist groups, foreign and domestic, present analogous concerns.

The article takes strong stands in support of public authority to suppress such uprisings. Pye found no incongruity, as a civil libertarian, in urging suspension of some individual rights given constitutional protection in normal times, in the interests of restoring public order.<sup>78</sup> For him, civil liberty is the fruit of law, and assaults on the legal order are to be understood as attacks on liberty.<sup>79</sup> He believed, however, that the measures he supported would, in the long run, impinge less on basic liberties than prevailing methods of suppressing civil disorders. The authors summarize their thesis as follows:

It is the purpose of this Article . . . to examine the manner in which the civilian institutions of justice should operate when faced with major disorder, the circumstances under which troops may be used to assist civilian authorities in restoring order, and the powers of troops and police under emergency conditions. It is our thesis that the purposes of the criminal process during times of civil emergency have

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77. A. Kenneth Pye & Cym H. Lowell, *The Criminal Process During Civil Disorders* (pts. 1 & 2), 1975 DUKE L.J. 581, 1021. One of the purposes of this article was to provide refutation for certain of the arguments and conclusions advanced by David E. Engdahl in a series of articles published by him between 1971 and 1973. Professor Engdahl's articles include *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971); *Due Process Forbids Soldiers in Civil Disorders*, AM. REP., Nov. 12, 1971, at G-5; *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399 (1972); *The Legal Background and Aftermath of the Kent State Tragedy*, 22 CLEV. ST. L. REV. 3 (1973).

78. "[W]e in no way depreciate the importance of understanding and, where possible, dealing effectively with the underlying causes of civil disorder. We also reject the notion that there is anything inconsistent in developing a capacity to maintain order while simultaneously engaging in political and social reform." Pye & Lowell, *supra* note 77, at 588.

79. Interestingly enough, the first paragraph of the article contains a statement of Alexander Hamilton, one sentence of which follows: "In a government framed for durable liberty, no less regard must be paid to giving the magistrate a proper degree of authority to make and execute laws with rigor than to guarding against encroachments upon the rights of the community." *Id.* at 581-82 (quoting Alexander Hamilton, *The Continentalist*, July 12, 1781, in II THE PAPERS OF ALEXANDER HAMILTON 651 (H. Syrett & J. Cooke eds., 1961)). There is no evidence that Pye's vigorous support of basic individual liberties ever weakened, or that he lost enthusiasm for political and social reform. There is some indication, however, that in the 1970s he found it necessary to devote greater attention to the criminal law as an instrumentality of social defense than in his earlier years. It seems likely that the riots of the 1960s and 1970s, and the unruly and sometimes violent campus protests in the Vietnam period, were factors in his apparent shift of attention.

not been generally understood and that a proper understanding dictates the conclusion that broader powers of arrest, search, and detention be entrusted to police and courts. Our thesis will also suggest that military forces may be appropriately used in support of civilian police where the disorder is of a magnitude which is beyond the latter's power to quell; but that, when so utilized the powers of the military should be no greater than those that may be exercised by the civilian police.<sup>80</sup>

The starting point of the article's argument is an inquiry into the purposes of the criminal law during times of extreme civil disorder: "Unlike its function in non-emergency periods, the criminal process in emergency situations is not primarily punitive, deterrent, rehabilitative, or retributive. Rather it is preventive and restorative."<sup>81</sup> A massive civil disorder should be recognized as a phenomenon justifying different responses by the criminal law from those in normal times. Pye believed that some police and judicial measures, now regarded as unlawful, may meet the constitutional test "if authorized by statute and justified by policy considerations."<sup>82</sup>

The case for enlarging certain police and judicial powers during serious civil disorders is made to rest on several grounds. First, the expansion of civilian authority is necessary to hasten termination of riots and their attendant violence and property destruction.<sup>83</sup> If, it is argued, the police are limited to powers available in normal times, pressures will be exerted to enlarge those powers to make them more adequate in times of emergency, an expansion that may leave the rights of persons more narrowly defined in normal times. Thus "[f]ailure to respond realistically to the legal problems created by a civil disorder may result in a diminution of civil liberties not only during the brief period of the emergency, but permanently."<sup>84</sup>

A further reason to enlarge civilian authority during emergencies is to limit resort to the military during such periods. The authors have no doubt that calling upon the military for assistance when civilian authority has demonstrated incapacity to suppress disorders is both lawful and necessary.<sup>85</sup> But we ought not to provide incentives for military interventions:

[T]here should be no incentive for either state or federal executives to use the troops instead of the civilian police as a means of quelling disorder. Such an incentive does . . . exist if the civilian police are

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80. *Id.* at 587-88.

81. *Id.* at 597.

82. *Id.* at 595.

83. "We also think that the danger of massive violence is lessened if police and courts have greater powers. . . . But containment and dispersal do not necessarily require massive firepower." *Id.* at 602.

84. *Id.* at 600.

85. "[W]e fundamentally disagree with the conclusion that military force may not or should not be used for [quelling civil disorders] if the ordinary civil procedures prove unable to maintain order." *Id.* at 657.

tightly limited to their normal non-emergency powers while the military is given broader discretionary authority to deal with disorders.<sup>86</sup>

Thus, when the military is summoned to suppress disorder it should be held to the same legal standards as those defined in advance for the civilian police and courts; and to make the mandate feasible, civilian authority must be enlarged in certain aspects.

The second part of the article is largely devoted to discussion of the areas in which the authors believed police and judicial authority should be enlarged during civil disturbances, and the reasons for such expansion. The argument is detailed and lengthy, and only a sketch can be given here. The authors would increase discretionary police arrest powers, including discretion to withhold arrest when offenses are committed in the officers' presence, and power to release arrested persons without judicial intervention when it is clear that the case would be *nolle prossed* if left in the system.<sup>87</sup> "Control over the exercise of this discretion should be accomplished by promulgation of rules and regulations to guide its exercise."<sup>88</sup> Nevertheless, specific limits should be imposed on arrest powers:

[W]e think it unnecessary, unwise, and unconstitutional to provide . . . broad powers to the police [to arrest persons who have committed no offense but who the police believe are about to do so]. The practical problems faced by police in a civil disturbance can be dealt with more effectively, and with less danger to civil liberties, by expanding the range of conduct which is unlawful during such an emergency [an example being possession of incendiary devices].<sup>89</sup>

Curfews would be authorized<sup>90</sup> and powers to establish road blocks expanded.<sup>91</sup> "Stop and frisk" would be validated.<sup>92</sup> Statutes should expressly authorize searches without a warrant for objects capable of injuring persons or damaging property, but searches must be supported by probable cause.<sup>93</sup> Warrantless area searches are rejected:

An area search is by its nature likely to invade the privacy of persons who are completely innocent of any wrongdoing . . . . It is not asking too much to require submission of the proposed search to a judicial officer before such a step is undertaken. Emergency searches of particular dwellings may sometimes be justified without a warrant, but area searches should always require one.<sup>94</sup>

The authors would permit courts in some situations to detain persons likely to reenter the riot zone, and to suspend their rights of bail even if serious crimes are not expected of them. The objective of bail require-

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86. *Id.* at 636-37.

87. *Id.* at 1031-32.

88. *Id.* at 1033.

89. *Id.* at 1036.

90. *Id.* at 1037-38.

91. *Id.* at 1062.

92. "In the context of civil disorder, the indignity of the stop and frisk seems minor compared to the importance of assuring that armed persons are not on the streets. In a sense, it is a lesser restriction than a curfew . . . ." *Id.* at 1044.

93. *Id.* at 1051.

94. *Id.* at 1059.

ments in normal times—to prevent the accused from fleeing before his trial—is largely inapplicable in the riot situation: “It is respectfully submitted that any sane society might grant such a defendant pretrial release if he promised to flee, but would deny it to him if he is likely to remain in the riot area.”<sup>95</sup>

As Kenneth Pye was well aware, the issues confronted in the article are contentious and difficult. He could not have expected complete agreement with all the positions advanced. But the article does more than defend conclusions on the particular points considered. It also makes a more general argument in favor of providing rational and systematic statutory guidance to public officers called upon to suppress future civil disorders.<sup>96</sup> The desirability of subjecting official conduct to the rule of law in such massive and destructive upheavals, rather than tolerating action based on an amorphous and unguided discretion, is difficult to question. Clear and carefully formulated statutory mandates may be expected not only to minimize unnecessary infringements of personal liberty in times of emergency, but they may also contribute to the efficiency of efforts to quell disorders; for one source of ineffectiveness of official action in riot situations has been doubt and uncertainty about the legal boundaries of official action. Yet, desirable as such statutory guidance would likely prove, the difficulties of achieving the necessary intelligent and dispassionate legislative consideration of such issues in periods of comparative calm are formidable. There is no issue so dead as last year’s crisis. Other more immediate problems clamor for legislative attention. Groups resisting any statutory limitations on official authority and those opposing any narrowing of individual rights can be expected to oppose legislative initiatives. Yet Pye was clearly right in urging reasoned consideration of penal policy in these difficult areas, and perhaps we may one day be persuaded to act on his advice.

A second general observation may be offered. Some persons may resist enlarging police powers in riot situations beyond the constitutional limits applicable to more normal times because of what might be called the “infection effect.” Modern history is replete with instances of measures ostensibly taken to limit individual rights in emergency situations being applied in the course of time to a whole range of law-enforcement activity in which no emergencies exist.<sup>97</sup> Pye was aware of the problem of

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95. *Id.* at 1073. The article contains a list of broad legislative measures the authors believed essential to the lawful containment of civil disorders; some of those proposals have not been touched on in the brief summary above. *Id.* at 1093.

96. “In substance, the issue is whether crucial decisions involving public safety and individual rights will be made in periods of comparative calm by popularly elected legislatures or in the tumult of a disorder by civilian or military executives.” *Id.* at 1089.

97. A somber account of the current state of criminal justice in Britain has been presented in recent newspaper accounts. *See, e.g.,* Ray Moseley, *Critics Say Legal Rights Latest Ulster Casualty*, CHI. TRIB., Oct. 17, 1993, §1, at 1, 14, 15; Ray Moseley, *Cops, Courts, Stifle Britons’ Rights*, CHI. TRIB., Oct. 18, 1993, §1, at 1, 13; *see also* Nina Zaltzman & Eli Lederman, *The Gradual Erosion of Defendant’s Status in Israeli Law*, 62 TEMP. L. REV. 1175, 1177 (1989); Dermont Walsh, *The Impact of Antisubversive Laws on Police*

confining emergency powers to emergencies. His answer was that emergency powers should be explicitly limited by legislation to the emergency period, and that methods for clearly determining the beginning and termination of the emergency should be statutorily mandated.<sup>98</sup> The modern threat of terrorist activity had not emerged when the article was being written. The "infection effect" of antiterrorist legislation may prove a more intractable problem than that threatened in the riot situation which Pye addressed. This is so, in part, because it may be impossible to define the beginning and end of threats of terrorist violence.

A final comment about the article should be made. Not all readers will agree with all positions defended by the authors, but all but very few will turn from the article impressed by the authorities and historical experience marshalled and by the range of considerations offered. Any future writing in the field will be required to give the article close attention.

#### IV. UNIVERSITY EDUCATION

It is the fate of educational administrators—deans and college presidents—to be called on for written pronouncements on the past, present, and future of American education. The resulting literature, it must be said, is rarely invigorating, and is often pretentious, melancholy, and depressing. Kenneth Pye, of course, made obligatory contributions to the literature; but it is more than friendly bias, I believe, that prompts the observation that his contributions were far more substantive and sprightly than most. Pye understood the hazards of the genre: "Unfortunately, the subject of [legal] education . . . is about as new to [the practicing bar] as would be a discussion of sin at a meeting of the College of Cardinals."<sup>99</sup> A systematic summary of Pye's views on law schools and universities will not be attempted here,<sup>100</sup> but a glance at some of his observations is of interest because they so clearly reveal the man.

Kenneth Pye's formidable candor makes itself apparent in these essays. On one occasion he wrote: "[T]here is often a 'Robin Hood' element in charging higher tuition and recycling that tuition to enable disadvantaged students to attend institutions they could not otherwise afford."<sup>101</sup> And again: "Most faculty teach fewer courses than they did two decades ago.

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*Powers and Practices in Ireland: The Silent Erosion of Individual Freedom*, 62 TEMP. L. REV. 1099, 1106 (1989).

98. Pye & Lowell, *The Criminal Process During Civil Disorders*, *supra* note 77, at 1078, 1093.

99. A. Kenneth Pye, *Clinical Education in the Law Schools*, 39 BAR EXAM. 9 (1970).

100. Pye's published essays on university education include the following: *What's Wrong With Our Universities?—An Additional View*, 14 HARV. J.L. & PUB. POL'Y 335 (1991); *Legal Education in an Era of Change: The Challenge*, 1987 DUKE L.J. 191; *Solvency and Survival After the Boom—A Different Perspective*, 34 J. LEGAL EDUC. 462 (1984) (with John R. Kramer); *Legal Education Past and Future: A Summer Carol*, 32 J. LEGAL EDUC. 367 (1982); *Clinical Education in the Law Schools*, *supra* note 99; *Problems in Legal Education (A Survey)*, 19 CLEV. ST. L. REV. 427 (1970); *Law School Training in Criminal Law: A Teacher's Viewpoint*, 3 AM. CRIM. L.Q. 173 (1965); *Legal Internships: Georgetown's Experiment in Legal Education*, 49 A.B.A. J. 554 (1963).

101. Pye, *What's Wrong With Our Universities*, *supra* note 100, at 339.

It is not self-evident that their teaching is significantly better. Nor is it clear that the quality, as distinguished from the quantity, of published scholarship is much better."<sup>102</sup> With great gusto he could launch barbs against the attitudes and performance of his colleagues in law schools and universities. On one occasion he observed: "[A] perusal of the recent editions of the *Journal of Legal Education* suggests that legal educators appear to be at a point midway between introspection and self-flagellation."<sup>103</sup>

Pye's sometimes acerbic comments reflected his conviction of the importance of universities in American society and an intense concern that educational institutions more faithfully serve the needs their functions are intended to satisfy. In 1991, he published a response to an article by Derek Bok, the retiring president of Harvard University.<sup>104</sup> Pye's essay is of particular interest, for it appeared near the end of Pye's distinguished career in educational administration, and may be taken as a statement of many of his mature views on the present state of American universities. In his article, Bok had stated several criteria to measure university performance. Pye responded by noting that

very few universities will be viewed as performing well if judged by all of his criteria . . . . The problem for most institutions is not acceptance of Bok's criteria in the abstract, but knowing where and how to seek an appropriate balance with the finite resources available . . . . [B]alance and priorities are the real issues for most universities.<sup>105</sup>

One of the most-discussed issues of balance and priority is that of adjusting what are asserted to be the conflicting claims of teaching and faculty research. Rather clearly, Pye would have elevated teaching competence to a higher level of importance in promotion decisions than would Bok. Pye states: "Although in most institutions specialization is the order of the day, it is conceivable that, even in a research university, there is a role for someone whose principal forte is good teaching, accompanied by only modest research."<sup>106</sup> Obviously, this does not end the matter. Particularly in state universities there is danger that the call for more teaching by full-time faculty may be taken up by politicians seeking a popular issue, with the result that regulations may be imposed that seriously weaken the capacity of the universities to meet their research obligations. Pye's personal experience, of course, made him aware of the difficulties of achieving rational accommodations in these areas. He predicted that university decisions to forego emphasis on research will not willingly be made in any foreseeable future. Such decisions "would hinder [the] institution's recruitment of students, deter many able young faculty from joining its ranks, and significantly impair the self-esteem of

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102. Pye, *Legal Education Past and Future*, *supra* note 100, at 380.

103. Pye, *Legal Education in an Era of Change*, *supra* note 100, at 199.

104. Pye, *What's Wrong With Our Universities*, *supra* note 100.

105. *Id.* at 338.

106. *Id.* at 341-42.

existing faculty."<sup>107</sup>

Pye was dissatisfied with the tenure practices in American universities: "No other profession, besides the priesthood, provides lifetime employment on the basis of a decision made about someone who is not yet forty."<sup>108</sup> Recognizing that faculty tenure has contributed importantly to academic freedom in the past, he urged consideration of new methods to secure that end in the future while guarding against teaching and research incompetence of some aging faculty members: "One such method might be for universities to extend initial, short-term contracts, to be followed by more lengthy contracts, which gradually diminish in length as the faculty member reaches advanced age. Periodic review by peers at regular intervals could also be instituted."<sup>109</sup>

As is true of most of us, Pye was frustrated by the inanities of published "rankings" of universities and university departments, such as those issued by *U.S. News and World Report*: "It would be easy to ignore such rankings if they did not have a significant impact upon students' choices of where best to study. It could be that many undergraduate students will receive the weakest undergraduate education at some institutions with the highest research productivity . . . ."<sup>110</sup>

In an earlier article, Pye "was struck with how rarely faculty apply their professional talents to the problems of . . . education."<sup>111</sup> Applying his professional skills to educational problems is precisely what Kenneth Pye did as an educational administrator and as a commentator on university issues. He acquired an impressive store of information on all aspects of the educational process, and developed a sensitive awareness of the interrelations of problems whose connections are often overlooked. He clearly perceived that how curricular, pedagogical, and intellectual problems are confronted in the universities will inevitably be conditioned by how issues of student aid, governmental fiscal policy, salary discrepancies, and a host of others are resolved.<sup>112</sup> His detailed understanding of this complex of interrelated factors contributed to a great part of his power as an educational leader.

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It was highly appropriate that, when Kenneth Pye resigned from the presidency of Southern Methodist University, its law school conferred on him a high academic honor, the William Hawley Atwell Professorship of Constitutional Law. This was more than a *pro forma* award for one who had rendered administrative services to the University. Instead, it can be understood as symbolic of a distinguished career in which teaching and scholarship were always a central concern. Had his life been spared, we

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107. *Id.* at 345.

108. *Id.* at 349-50.

109. *Id.* at 350.

110. *Id.* at 345.

111. Pye, *Legal Education Past and Future*, *supra* note 100, at 378.

112. *See id.* at 378-79.

can be certain that he would have published other distinguished contributions reflecting a lifetime of thought, dedication, and unique experience. It is impossible not to regret our loss. This is not a time, however, to count our losses, but rather one to celebrate his achievements and character. There is much to celebrate.



